रजिस्टर्ड नं० पी० एस० एम० 14.

राजपत्र, हिमाचल प्रदेश

(असाधारण)

हिमाचल प्रदेश राज्यशासन द्वारा प्रकाशित

शिमला, बुधवार, 14 अगस्त, 1974/23 श्रावण, 1896

GOVERNMENT OF HIMACHAL PRADESH

INDUSTRIES DEPARTMENT

NOTIFICATION

Simla-2, the 25th July, 1974

No. 10-21/74-SI.—In pursuance of section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947), the Governor of Himachal Pradesh is pleased to publish the following award of the Presiding Officer of the Labour Court, Himachal Pradesh, Simla, in the Industrial Dispute between Shri Hem Raj Sood *vs.* Messrs Diwan Chand Atma Ram, 47, The Mall, Simla, which was received by the Government on the 8th May, 1974:—

Before Shri Kedar Ishwar
Presiding Officer, Labour Court, Himachal Pradesh, Simla

Case file No. 1 of 1972
Instituted on 12-6-1972

In the matter of Shri Hem Raj Sood, r/o Building Hakam Tani Mal, Sanjauli, Simla .. *Applicant.*

Versus

Messrs Diwan Chand Atma Ram, 47, The Mall, Simla .. *Respondent.*

Application under sub-section (2) of section 33-C of the Industrial Disputes Act, 1947.

AWARD

1. By this application, under sub-section (2) of section 33-C of the Industrial Disputes Act, 1947, Hem Raj Sood, hereinafter called the applicant, claims a sum of Rs. 2,762.50 paise as retrenchment compensation from Messrs Diwan Chand Atma Ram, hereinafter called the respondent.

2. The applicant was admittedly in the service of the respondent since 1953. In June, 1970, the respondent served the applicant with a notice terminating his services. It is the case of the applicant that his service was terminated because he became a surplus hand. The action of the respondent in terminating the service of the applicant was resisted by the latter as also by the Simla Beopar Karamchari Sangh. A demand notice for the payment of his dues was served on the respondent and the latter paid the dues of the applicant including his salary. But, according to the applicant, he was not paid the retrenchment compensation which he was entitled to get under section 25-F (b) of the Industrial Disputes Act. He has claimed retrenchment compensation equivalent to 15 days' average pay for every completed year of continuous service. His pay admittedly at the time of the termination of his service was Rs. 325 per month and he had served respondent for 17 years.

3. The respondent has resisted the claim of the applicant on various grounds. While admitting that the applicant was in the service of the respondent, it has been denied that he was a workman within the meaning of section 2(s) of the Industrial Disputes Act. It has also been denied that the service of the applicant was terminated because he was a surplus hand or that he had been retrenched. According to the respondent the applicant had been putting pressure every now and then to get-enhanced pay and his behaviour had become intolerable. The applicant having expressed a desire to be relieved, a notice under section 14 of the Punjab Trade Employees Act, 1940 was issued to him and his service was terminated. The liability of the respondent to pay the retrenchment compensation has thus been denied. It has also been submitted that the Labour Court has no jurisdiction to decide the question of the payment of retrenchment compensation. The plea that the claim is time barred has also been taken by the respondent.

4. The respondent was permitted to amend his written statement by my order dated April 20, 1973. In the amended written statement the respondent took the plea that the applicant was a salesman and was, therefore, not a workman within the meaning of section 2(s) of the Industrial Disputes Act was not maintainable as the Labour Court did not have the jurisdiction to determine whether the applicant was a workman or not. Lastly it was contended by the respondent that when the other dues of the applicant were paid to him he had given a receipt to the effect that he was taking the payment in full and final settlement of his claim and that being so he was estopped from claiming the retrenchment compensation.

5. On the pleadings of the parties the following issues were framed:—

1. Whether the petitioner was a workman as defined in section 2(s) of the Industrial Disputes Act and, therefore, is entitled to claim the relief prayed for? .. O.P.P.
2. Whether this Court has no jurisdiction to decide the above issue ? O.P.R.
3. Whether the instant case is not a case of retrenchment and, therefore, the provisions of the Industrial Disputes Act do not apply and the application is not maintainable? .. O.P.R.
4. Whether the claim of the applicant is time barred? .. O.P.R.
5. Whether the acceptance of Rs. 770.48 paise by the applicant from the respondent was in full and final settlement of his entire claim? If so, whether the applicant is estopped from laying the instant claim? .. O.P.R
6. Whether the applicant is entitled to get compensation amounting to Rs. 2,762.50 paise, as alleged by the applicant? .. O.P.A
7. Relief.

6. The applicant examined as many as eight witnesses in support of his claim. The applicant also appeared as his own witness. The respondent examined three witnesses. Shri Shiv Charan Das the proprietor of the respondent firm, has also appeared as a witness on behalf of the firm.

Issues 1 & 2:

7. A claim under section 33-C(2) of the Industrial Disputes Act can be laid only by a workman. And under section 25-F(b) too it is the workman who can claim the retrenchment compensation. It is, therefore, necessary to determine whether the applicant was a workman within the meaning of section 2(s) of the Industrial Disputes Act.

"Workman" as defined in section 2(s) means any person employed (including an apprentice) in any industry to do any skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be expressed or implied and for the purpose of any proceedings under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment had led to that dispute but does not include any such person .....". I have omitted the remaining portion of the definition of workmen because that portion is irrelevant for the purposes of this case. It seems clear that for an employee in an industry to be a workman under section 2(s) he must be employed to do skilled or unskilled manual work, supervisory work, technical work or clerical work. If the work done by an employee is not of such a nature, he will not be a workman. In order to determine whether the applicant was a workman it has to be seen as to in what capacity he had been employed by the respondent. It is not seriously disputed that the applicant was working as a salesman with the respondent. It is in the statement of the applicant that he was shown "a salesman" on the Register of Employees maintained by the respondent firm. His contention, however, is that he was doing other jobs also for the respondent. This is what he has to say when he appeared as his own witness:

> "I was shown as salesman on the 'register of employees' maintained by the firm but I was doing other jobs also for the firm. I used to clean my counter, the entire goods out of the show boxes had to be arranged by me and put in the show boxes. I had to decorate the show windows of the shop on every Sunday.....The goods that we received from the firms outside

were checked by me after the boxes had been opened. The prices were recorded by me on the various articles as directed by the proprietor. I used to maintain the stock register of the firm. I used to make the relevant entries in the cash memo. register..... There was a tailoring department in the firm. The firm used to supply uniforms to the Bishop Cotton School, after the uniforms had been duly stitched. I used to go to the school some time with the tailor and some time without him and used to bring the measurements of the children from there. I then made the relevant entries in the register of the firm. The cloth was at first purchased by me on behalf of the firm from the various shops at Simla but latter the firm used to purchase the cloth from the market in Delhi. Then I used tc give the cloth to the tailor. We were giving work to some 5 or 6 tailors. The firm had a shawls department. The firm used to give the wool to the weavers/shawl makers and this work was done by me. I also used to obtain orders for the shawls on behalf of the firm to make the deposits and also to retire the R.Rs. Other transactions in the bank were also done by me on behalf of the firm. When Shri Shiv Charan Dass was operated upon for his eyes, the cash book and ledger were also filled in by me."

8. In his cross examination, however, the applicant stated that he used to work as a salesman only when there was a great rush in the firm otherwise he was called upon to do other sundry work. In support of his contention above, the applicant examined Jayanti Parshad, Kewal Ram Sharma, Bachaspati, Ram Lal and Fateh Singh. Shri Jayanti Parshad worked with the respondent firm as a tailor for three years and according to him the applicant came to him for about 40 to 50 times in connection with the tailoring work of the firm. Shri Kewal Ram was in the private service of the Rana of Tharoch. He got a pant stitched from the firm and the measurements were taken by the applicant. According to Shri Bachaspati the applicant had purchased sticks from him twice or thrice some five or six years ago but he was not in a position to say as to for whom these sticks were purchased. Shri Ram Pal is a Karyana Merchant. According to him the applicant had been purchasing pulses from his shop either for himself or for L. Shiv Charan Dass the proprietor of the respondent firm. He further stated that he used to purchase wool or shawls from the respondent firm and whoever was at the counter including the applicant used to sell these things to him. This witness further stated that the applicant used to come to his shop some times to weigh the wool. Shri Fateh Singh is a witness who worked with the respondent firm in the year 1967 for abou t 9 months. He stated that the applicant used to take the wool from the shop and gave it to the weavers. He also used to accept cloth from various persons for tailoring and then took this cloth to the tailor. He also used to go to the Bank on behalf of the firm. But this witness stated that the main work of the applicant was to show the various articles in the shop to the customers and to sell the same to them that is too say his main work was that of a salesman.

9. On the other hand the respondent has examined Sant Ram Narwal, a clerk of the National and Grindlays Bank, Simla, Sudesh Kumar, a tailor of Simla and Chhanga Ram, a shawl weaver of Mashobra, Simla. Shri Sant Ram stated that the respondent firm has dealing with the National and Grindlays Bank and he knew the applicant because he (witness) has been going to the shop of the respondent firm and sometimes the applicant has been coming to the Bank. According to this witness the main job of the applicant was that of a salesman. The applicant came to the bank once or twice in a year on behalf of Messrs Diwan Chand Atma Ram. According to Shri Sudesh Kumar R.W. the respondent firm has been preparing uniforms for the school children. He and his father have been working as tailors for the respondent firm on contract for about ten years. He has been taking the measurements of the children

in the school whenever he was asked by the firm to do so. According to this witness the applicant was working as a salesman with the respondent firm though he has been coming to his shop to enquire whether the uniforms had been stitched or not. Shri Chhanga Ram R.W. has been preparing shawls for the respondent firm after taking the wool from the shop. He states that it was not necessary to weigh the wool. The applicant had been taking out the wool in the shop and gave it to him and that he also used to do some other work. Shri Shiv Charan Das—the proprietor of the respondent firm has categorically stated that the applicant was working exclusively as a salesman. No question was put to him in the cross examination to elicit the information whether the applicant was doing any other job for the respondent firm or not.

On a perusal of the evidence examined by the parties, I am of the firm view that the applicant was employed as a salesman. Even if the statements of the witnesses, examined by the applicant, are taken at their face value it can at the most be said that the applicant was doing some other jobs occasionally, but his main work was that of a salesman. The cleaning of the counter, placing the goods in the show boxes, decoration of the show windows, recording of the prices on various articles etc., are the job of a salesman and something incidental to the main job of canvassing the customers for the purchase of goods. The applicant may have occassionally gone to the bank or made entries in the stock register of the firm or even gone to the tailor to fetch him but that will not mean that it was his main job. If he went to purchase the pulses or the sticks for the proprietor of the firm that may be out of courtesy and not because it was his job for which he had been employed by the respondent. Taking this view of the evidence I hold that the applicant was employed by the respondent as a salesman.

10. The next question that arises in whether a "Salesman" is a "Workman". The work of a salesman in a shop is to canvass sales. This is a work which does not require any technical knowledge. He cannot be said to be doing any skilled or unskilled manual work. He has neither to supervise any body's work nor a salesman does any clearical work. That being so, the applicant does not come with the meaning of the word "Workman" as defined in section 2(s) of the Industrial Disputes Act. In Burmah Shell Oil Storage and Distribution Company of India Ltd., and the Burmah Shell Management Staff Association and others and *vice versa* (1970 Labour Law Journal, Volume II page 590) the Supreme Court made the following observations:—

> "If every employee of an industry was to be a workman except those mentioned in the four exceptions, these four classifications need not have been mentioned in the definitionand a workman could have been defined as a person employed in an industry except in cases where he was covered by one of the exceptions. The specification of the four types of work obviously is intended to lay down that an employee is to become a workman only if he is employed to do work of one of those types, while there may be employees who, not doing any such work, would be out of the scope of the work 'workman' without having the resort to the exceptions.
>
> An example, which appears to be very clear, will be that of a person employed in canvassing sales for an industry. He may not be required to do any paper work, nor may be required to have any technical knowledge. He may not be supervising the work of any other employees, nor would be doing any skilled or unskilled manual work. He would still be an employee of the industry and, obviously such an employee would not be a workman, because the work for which he is employed is not covered by the four types mentioned in the definition and not because he would be taken out of the definition under one of the exceptions."

The Supreme Court further held that in a case where there is a dispute whether a particular individual is a workman or not it must be ascertained as to what is the main or substantial work which he is employed to do. If his main work does not fall under any of the clauses mentioned in section 2(s) of the Industrial Disputes Act, even though he may be doing casually or incidental to his main work any of such works as referred to above, he will not be taken to be a workman. In the circumsfances I hold that the applicant was not a workman and, therefore, he is not entitled to lay claim under the relevant provisions of the Industrial Disputes Act.

11. The next question that falls for considerction is with regard to the jurisdiction of the Labour Court even to determine under section 33-C(2) of the Industrial Disputes Act, whether the applicant is a workman or not. It has been argued on behalf of the applicant that it is within the competence of the Labour Court under section 33-C(2) of the Industrial Disputes Act to determine the status of the applicant in order to give him the relief claimed by him. If the Labour Court does not have the jurisdiction it will always be open to an employer to raise the question that a claimant is not a workman and thus to defeat the very purpose of section 33-C(2). This question came to be considered by the Delhi High Court in the case between "Shri Tek Chand and the Labour Court, Delhi and others" [1973(1) Labour Law Journal, page 470] and it was held that:—

> "a perusal of the above S.33-C(2) reveals that a workman can move a Labour Court by resorting to the provisions when he is entitled to certain benefits which are required to be computed or worked out only. In such an even the jurisdiction of the Labour Court could be invoked to compute in terms of money the benefits which a workman claims. However, resort to this section cannot be made by person who is not a workman.
>
> The principle deducible from Sher Singh Verma *vs.* Rup Chandra and another, (1964 D.L.T. 327), and East India Coal Company (by Chief Mining Engineer, Bararee Colliery Dhanbad *vs.* Rameshwara and others, (1968-I.LL.J.6), is that it is the existing Might which has already been adjudicated upon or provided for which alone can be computed by the Labour Court. In the instant case since the very status of the petitioner was in dispute, it cannot be urged that is was open to the Labour Court to adjudicate upon the question of petitioner's status as a workman."

A similar view was taken by the Punjab High Court in the case between "Sher Singh Verma and Rup Chandra and another" (1967 Labour Law Journal, Vol. 2, page 682). It was observed by the Court as under:—

> "The labour court under S.33-C(2) is primarily given power to execute or implement his existing individual right and it may, thereore, be necessary in some cases to determine such a right. Such determination, however, must be confined to matters incidental to the main issue, namely, the computation of benefits to which a workman is entitled. The question whether the claimant is a workman at all or not would not be incidental to the determination of the main question.
>
> The labour court acted without jurisdiction in deciding the issue s to the existence of the retionship of mster and servant".

Relying upon these authorities, I am constrained to hold that the Labour Court does not have the jurisdiction to determine the question whether applicant was a workman. Issues No. 1 and 2 are, therefore, found against the applicant.

Issue No. 3:

12. The case of the applicant is that he was retrenched and, therefore, is entitled to claim compensation under section 25F(b) of the Industrial Disputes Act. The word 'retrenchement' has been defined in section 2(*oo*)of the Industrial Disputes Act to mean the termination by the employer of the services of a workman for any reason whatsoever, and otherwise than as a punishment inflicted by way of disciplinary action, but does not include..... This word came to be considered by the Bombay High Court in National Garage, Nagpur *vs.* J-Gonsalves and others [The Indian Factories Journal, Vol. XXI (1961-62) page 435] and the Court relying upon the observations made by the Supreme Court in Har Parshad Shivshankar Shuklu *vs.* A.D. Divelhar (1956, IIF.J.R. 317) held:

> "Retrenchment" as defined in section 2(*oo*) of the Industrial Disputes Act, 1957, means the discharge of surplus labour or staff in a continuing or running industry. Whether a termination of service amounts to retrenchment must be determined in each case on the facts and circumstances of that case. If the termination of service is found to be due to the reason that the workman discharged was surplus, *i.e.*, in excess of the requirements of the business, it will amount to retrenchment. There is no presumption that where a workman is discharged simplicitor, *i.e.* without any reasons being assigned for the discharge, the discharge is as surplusage."

In the Supreme Court case (Supra) it was observed that retrenchment as defined in section 2(oo) and as used in section 25-F of the Industrial Disputes Act has no wider meaning than the ordinary, accepted Connotation of the word: "it means the discharge of surplus labour or staff by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action....." In order to lay a claim under section 25.F the applicant had to show that he was discharged because he had been found to be surplus by his employer. Threre is no evidence on the record in this behalf except for the statement of the applicant. His bald statement cannot be believed. When the applicant appeared as his own witness he stated that he made a demand on the respondent for retrenchment compensation in the presence of Shri Amar Nath and that this demand was refused by the respondent. When Shri Amar Nath appeared as a witness on behalf of the applicant, he stated that there was no reference nor any demand was made for the retrenchment compensation at the time when the respondent firm made the payment to the applicant, in respect of his other dues regarding salary etc. On the other hand it is to be found in the evidence that the days when the applicant was discharged from service were the peak business days in Simla and the firms usually employed more staff in order to meet the need of the customers. In the notice Ex. P.W. 8/A dated May 19, 1970 it was specifically said by the respondent firm that the leave was granted to the applicant despite the fact "that the season is in full swing and this is not the time for getting leave." When the applicant sent his reply, Ex. A.W. 8/B to the notice on May 25, 1970 he denied all the allegations made by firm but not a suggestion was made by him that he was being retrenched. In these circumstances I am constrained to take the view that when the service of the applicant was terminated by the respondent firm it was not done by way of retrenchment, and as such the applicant is not entitled to any benefit under section 25-F(b) of the Industrial Disputes Act.

13. Another question that has been raised under this issue is whether the Labour Court has the jurisdiction to determine the question of retrenchment under section 33-C (2) of the Industrial Disputes Act. The Madras High Court in 1973 Labour and Industrial Cases 882 considered this question and gave a reply in the negavtie. The Court

furthrr observed that it is only the Industrial Tribunal under section 7-A read with sch. 3, Item 10 of the Industrial Disputes Act which can decide such a question. I, therefore, hold that the instant case is neither a case of retrenchment nor the application is maintainable before a Labour Court. Issue No. 3 is, therefore, found against the applicant.

Issue No. 4:

14. This issue has not been pressed by the respondent and rightly so because no limitation is prescribed for an application under Sec. 33-C(2) of the Industrial Disputes Act.

Issue No. 5:

15. This issue needs no detailed discussion in view of my findings on issues 1 to 3. However, it may be observed that the parties did not have even an idea about the retrenchment compensation at the time when the receipt Ex.P.W.8/F was executed by the applicant. The words "in full and final settlement" occurring in this receipt do not bear the signature of the applicant and I have no hesitation to hold that when the payment of Rs. 770.48 paise was made to the applicant by the respondent there was neither any demand for the retrenchment compensation nor it had been considered at that time. The applicant is, therefore, not estopped from claiming the amount of Rs. 2,762.50 paise in case he is found entitled to lay the claim. The issue is decided accordingly.

Issue No. 6:

16. In view of the decision on issues No. 1 to 3, this issue is also decided against the applicant.

In the result the claim of the applicant fails and the same is hereby dismissed. However, in view of the peculiar circumstances of this case the parties are left to bear their own costs. A copy of the award be sent to the Himachal Pradesh Government through the Secretary, Labour and Employment, for publication in the Gazette and for further necessary action.

Announced.

DATED: 23-3-1974.

KEDAR ISHWAR,
Presiding Officer,
Labour Court, Himachal Pradesh, Simla.

By order,
P. K. MATTOO,
Secretary.

उप-नियन्त्रक, मुद्रण तथा लेखन-सामग्री, हिमाचल प्रदेस, शिमला-3 द्वारा मुद्रित तथा प्रकाशित ।